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No. ~~264~~ 71-264

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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., et al.,

Respondents.

BRIEF OF RESPONDENTS LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORP., UNION TANK CAR CO. AND CORN PRODUCTS CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the Writ of Certiorari be denied.

I. RESTATEMENT OF THE CASE

Petitioner's statement of the case is a confusing conglomeration of references to pleadings and judicial opinions in numerous cases and miscellaneous assertions of fact or opinion. The controlling facts, however, are simple. They involve this case and petitioner's earlier lawsuit in the Illinois state courts against the respondents (hereinafter "the state court case").

The State Court Case.

In 1963, petitioner, suing solely as a taxpayer, brought an action in the Circuit Court of Cook County, Illinois, against the Metropolitan Sanitary District of Greater Chicago ("Sanitary District"), an Illinois municipal corporation, and a number of business corporations (including all but one of respondents here) which had leased land from the Sanitary District under long-term leases. The complaint contended that the leases were invalid and that the past and future rentals under those leases were grossly inadequate. Motions to dismiss were filed. The judge, after extensive argument, dismissed petitioner's amended complaint. (App. p. 30). The principal ground for this decision was that petitioner, as a taxpayer, had no cause of action under Illinois law because he had not suffered any injury different in kind or degree from that suffered by all other members of the public—the Illinois so-called "special injury rule."*

On appeal, the dismissal was affirmed by the Illinois Appellate Court. *Booth* v. *Metropolitan Sanitary District*, 79 Ill. App. 2d 310, 224 N.E. 2d 591 (1967). The Appellate Court agreed with the trial judge that petitioner had no cause of action under Illinois law.

At no time during the pendency of the state court action did petitioner assert either that his attacks on the Sanitary District leases were predicated in part upon the Federal Constitution, or that the Illinois "special injury rule" violated the Federal Constitution. After losing in the Illinois Appellate Court, petitioner did not seek further review

* At later stages of the proceedings petitioner admitted that the judge had correctly interpreted and applied Illinois law in his decision.

of the case in the Illinois Supreme Court or in the United States Supreme Court.

The Case At Bar.

Almost two years later, on November 20, 1968, petitioner commenced the pending litigation in the Federal District Court in Chicago. His complaint again joined the Sanitary District and the respondent lessees, and again attacked the same lease transactions which had been attacked in the state court action, on the same grounds, *i.e.*, that the leases were invalid and did not result in adequate past or future rental to the Sanitary District. There were only two material changes from the complaint filed in petitioner's state court action. First, petitioner's federal complaint added a separate count which sought a declaratory judgment invalidating an additional 75 or more leases held by persons or corporations which were not made parties-defendant. Second, the complaint now asserted that the lease transactions and the Illinois "special injury rule" violated petitioner's constitutional rights of due process and equal protecton of the laws, and that the federal court had jurisdiction of the action under 28 U.S.C., §§ 1331 and 1343(3).

After petitioner was twice permitted to amend his complaint, Chief Judge Robson granted defendants' motions to dismiss on the grounds that the court lacked subject matter jurisdiction because the complaint failed to raise any substantial federal question, and that the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331 was applicable and not satisfied. Because of its ruling, the Court did not reach defendants' arguments that petitioner's claims were barred by *res judicata* and collateral estoppel. *Booth* v. *Lemont Mfg. Corporation*, 304 F. Supp. 235 (N.D. Ill. 1969).

Petitioner appealed. After briefs had been filed, petitioner filed a so-called "emergency motion," requesting immediate reversal and a hearing *en banc*. The motion was denied. In his emergency motion, petitioner specifically referred to the fact that the Honorable Judge Otto Kerner of the Court of Appeals had been named as a defendant (in his then official capacity as Governor of Illinois) in prior litigation which had involved the Illinois "special injury rule" and which respondents had cited as a precedent. *Droste* v. *Kerner*, 34 Ill. 2d 495, 217 N.E. 2d 73 (1966), *appeal dismissed*, 385 U.S. 456 (1967). Not only did petitioner fail to suggest that Judge Kerner should disqualify himself but petitioner's motion encouraged Judge Kerner to participate in the *en banc* hearing petitioner was requesting. The following is a complete quotation of the portion of petitioner's "emergency motion" which relates to this subject:

> "The Lessee-Defendants and Plaintiff have generally agreed that one of the leading cases bearing upon this litigation has been the case of *Droste* v. *Kerner*, 34 Ill. 2d 495, in which Judge Kerner of this Court became a defendant in his capacity as Governor of Illinois. In the same capacity, and during his distinguished service as Governor, he also approved various changes in the District laws relating to its leases and other phases of its operations. *Such facts should not, of course, stand as a barrier to a hearing en banc upon this appeal, should this Court look with favor upon the plaintiff's suggestion.*" (Emphasis supplied.) (Motion of plaintiff-appellant, filed November 11, 1970, para. 8, p. 6.)

After oral argument, the Court of Appeals on January 28, 1971, issued an opinion, written by Judge Kerner, which sustained Judge Robson's dismissal of the complaint. The Court of Appeals rejected, as a matter of law, petitioner's

contention that the leasing of municipal real estate for inadequate rentals would deprive individual taxpayers of property without due process of law. The Court of Appeals did not reach the issue of whether the Illinois "special injury rule" violated any procedural due process or equal protection rights of petitioner, since it concluded that petitioner's failure to appeal the dismissal of his prior state court action to the Illinois Supreme Court and, if necessary, to this Court, had estopped him from claiming that he had been the victim of the application of an unconstitutional rule of law in that prior litigation. Since these rulings amply supported affirmance, the Court of Appeals did not reach the other grounds for affirmance which had been argued by respondents. *Bo[illegible]* v. *Lemont Mfg. Corporation*, 440 F. 2d 385 (7th Cir. 1971).

Petitioner sought rehearing *en banc*, asserting for the first time that Judge Kerner should have disqualified himself from participating in the case because he had been named party-defendant in *Droste* v. *Kerner*. (App. p. 50). On March 29, 1971, the Court of Appeals denied the motion for rehearing in an order which recited that not one of the judges on the entire court had voted to grant the petition. (App., p. 6).

II. REASONS FOR DENYING THE WRIT

I.

Petitioner's Attack On Judge Kerner Is Unwarranted And Does Not Constitute A Basis For Granting Certiorari.

A. Petitioner's Attack On Judge Kerner Is Totally Devoid Of Merit.

Petitioner's argument that Judge Kerner should have disqualified himself is without merit. Petitioner's objection is predicated solely upon the fact that Judge Kerner was named as a nominal defendant in an action which was cited as a precedent by the defendants—though it was not cited in the opinion of the Court of Appeals. The case was *Droste* v. *Kerner,* 34 Ill. 2d 495, 217 N.E. 2d 73 (1966), *appeal dismissed,* 385 U.S. 456 (1967). In that case a taxpayer attacked the constitutionality of a statute which conveyed title to submerged public land to United States Steel Corporation. Judge Kerner (then Governor of Illinois) and the Illinois Secretary of State were among those made defendants in their official capacities, as persons with responsibilities relating to carrying out the conveyance contemplated by the statute. Both were defended by the State Attorney General, who supported the constitutionality of the statute. There can be no dispute that Judge Kerner had no personal interest in that case, that he was threatened with no personal liability, and that he was made a defendant in his official capacity solely to create a procedural situation in which the constitutionality of the statute could be properly attacked.

These facts could not conceivably give rise to any valid motion which would require Judge Kerner to disqualify himself. The sole statutory basis for disqualification of

a United States Court of Appeals Judge appears in 28 U.S.C. §455 which states:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Even petitioner does not claim that Judge Kerner has an interest, has been of counsel or a witness or is related to or connected with any party or his attorney *in this litigation.* Petitioner's sole claim is that Judge Kerner was a nominal party in another case upon which petitioner relies to establish the legal principle which he contends entitles him to relief in this case. No authority is required to establish that a judge is not subject to disqualification merely because he acted as counsel or was a party in prior litigation which is relied upon as precedent in the case before the judge. "Interest" in a proceeding, whether at common law or in the above statute, refers not to an interest in a similar suit or to interest in a point of law as such but rather to a stake in the direct outcome of the particular case. Indeed, the law is clear that a judge is not disqualified even if he was a nominal party or was otherwise involved in an official capacity in earlier stages of the same litigation. *General Tire & Rubber Company* v. *Watkins,* 363 F. 2d 87 (4th Cir. 1966); *Neil* v. *U.S.,* 205 F. 2d 121 (9th Cir. 1953); *Dade County Board of Public Instruction* v. *Michigan Mutual Liability Company,* 169 So. 2d 483 (Fla. 1964); *Aetna Insurance Company* v. *Travis,* 259 P. 1068 (Kan. 1927). In three of the above cited cases the judge had been a nominal party or attorney in the *same* case which he was allowed to hear. Judge Kerner was a nominal party in an entirely different and unrelated case

in which he had no stake. Petitioner has made no showing that Judge Kerner was in any manner biased. Indeed, it is obvious that Judge Kerner's having been named a nominal party in his capacity as Governor in the *Droste* litigation could not result in his possessing a personal interest in that case which might give rise to a charge of bias in this case.

B. Petitioner's Afterthought Attack Is Barred By His Prior Invitation To Have Judge Kerner Participate.

There can be no question that failure to make timely objection when a party believes a judge is subject to disqualification pursuant to 28 U.S.C. §455 constitutes waiver of any such objection. *Thomas* v. *U.S.*, 363 F.2d 849 (9th Cir. 1966); *Adams* v. *U.S.*, 302 F.2d 307 (5th Cir. 1962); *U.S.* v. *Hetherington*, 279 F.2d 792 (7th Cir. 1960). Here petitioner's frivolous objection was not even timely raised. Indeed, petitioner effectively invited Judge Kerner to participate in this case. Prior to oral argument, petitioner filed a so-called "emergency motion," seeking a hearing *en banc* and other relief. In one paragraph of this motion, petitioner specifically referred to Judge Kerner's role as a defendant in *Droste* v. *Kerner*. Petitioner then stated:

> "Such facts should not, of course, stand as a barrier to a hearing *en banc* upon this appeal, should this Court look with favor upon the plaintiff's suggestion." (Motion of plaintiff-appellant, filed November 11, 1970, para. 8, p. 6.)

Obviously, this statement operated as a waiver of the objection now raised by petitioner. Indeed, it is difficult to see that the inclusion of this statement and the reference to *Droste* v. *Kerner* in petitioner's motion could have any meaning other than as an intentional waiver of the objection which petitioner now belatedly asserts.

Petitioner's "emergency" motion was denied. At oral argument, petitioner referred again to Judge Kerner's status as a defendant in *Droste* v. *Kerner,* but made no objection to his participation. Petitioner was given leave to submit additional authorities after oral argument. He did so in a letter, dated November 26, 1970, which makes no objection to Judge Kerner's participation. Indeed, petitioner's objection was raised for the first time in his petition for rehearing—after he had discovered that Judge Kerner had not voted to decide the case in his favor. The authorities establish that petitioner, by his conduct, has waived the type of technical disqualification objection which he now asserts.

II.

The Lower Courts Properly Determined That Petitioner's Claim Is Not Within The Jurisdiction Of The Federal Courts.

Essentially, the lower courts held that the nature of petitioner's complaint—dissatisfaction with the financial returns on leases of municipal real estate—did not fall within the limited subject matter jurisdiction of the federal district courts. This conclusion is clearly correct on either of two independent grounds: First, that the complaint does not raise any substantial federal constitutional claim; and second, that the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331(a) is applicable and has not been satisfied. These two grounds will be discussed in Sections A and B, *infra.*

A. Petitioner's Complaint Does Not Raise A Substantial Federal Constitutional Question.

Under either Section 1331 or Section 1343 of the Judicial Code, the two jurisdictional sections relied upon by petitioner, it is necessary that the complaint raise a substan-

tial question under the Constitution or laws of the United States. Petitioner asserts various theories based upon the due process and equal protection clauses of the Fourteenth Amendment. However, the lower courts correctly determined that these theories were insubstantial and, further, that petitioner was estopped from asserting them by reason of his conduct in the prior state court litigation.

1. Leasing Of Municipal Real Estate At Inadequate Rentals Does Not Violate The Federal Due Process Rights Of Each Taxpayer.

One of petitioner's theories asserts that any lease or contract involving municipal property which a taxpayer believes does not produce an "adequate" or "fair" return or benefit to the municipality, or which contains other terms not sufficiently favorable to the municipality, permits any municipal taxpayer to seek redress in the federal courts on the ground that he, as a taxpayer, has been deprived of "property" without due process of law. As the lower courts properly concluded, this sweeping proposition is utterly unsound, and its acceptance would result in the wholesale transfer of disputes concerning the management of municipal property or the disbursement of municipal funds to the federal courts. *Otto* v. *Somers*, 332 F. 2d 697, 699-700 (6th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965); *Owensboro Waterworks Co.* v. *Owensboro*, 200 U.S. 38, 45-46 (1906).

2. The Existence Of The Old Illinois Special Injury Rule Provides No Basis For Federal Jurisdiction Over Petitioner's Claims.

Petitioner's second and principal constitutional theory is an argument that procedural due process and equal protection of the laws require state recognition of local tax-

payers' actions challenging the legality or propriety of conveyances or leases of municipal real estate, and that a state court's failure to recognize a taxpayer's action in such circumstances deprives the suing taxpayer of a Fourteenth Amendment "right to be heard" and permits him to maintain a subsequent action on the same claims in the United States District Courts.

It is undisputed that Illinois courts formerly applied a "special injury rule" which barred individual members of the public or taxpayers, as such, from judicially attacking the validity of leases or conveyances of municipal real estate, or from seeking to prevent alleged improper use of such real estate. Under this Illinois rule, lawsuits in those categories could be maintained by a number of appropriate public officials, or by citizens (such as adjoining land-owners) who suffered special injury because of the alleged misuse of the municipal real estate, different from the injuries suffered by the public at large. It is also undisputed that this special injury rule was overruled on policy grounds by the Illinois Supreme Court in *Paepcke* v. *Public Building Commission*, 46 Ill. 2d 330, 341, 263 N.E. 2d, 11, 18 (1970). As the lower courts properly held, however, these facts do not sustain petitioner's complaint in this action. There are several reasons for this conclusion.

First, as the Court of Appeals properly held, petitioner's attempt to complain *in this action* that the dismissal of his prior state court litigation violated the Federal Constitution, constitutes a flagrant attempt at piecemeal litigation which does not give rise to federal jurisdiction and is barred by *res judicata* and collateral estoppel. The law is clear that a plaintiff may not divide up a single cause of action by proceeding first in the state court on state law theories, and then starting a new action on the same facts

in the federal district court based on federal constitutional theories. The proper method for petitioner to have vindicated his so-called "right to be heard" on the alleged unconstitutionality of the Illinois special injury rule would have been to have raised that constitutional argument in the Illinois trial court and appellate court which dismissed his state court complaint, and to have appealed from the adverse decisions first to the Illinois Supreme Court and then to this Court.

This Court's decision in *Angel* v. *Bullington,* 330 U.S. 183, 189-190 (1947) is precisely in point. In that case the plaintiff's state court action for a deficiency judgment was dismissed because the state law did not recognize actions for a deficiency judgment. The plaintiff in that case, like petitioner here, did not appeal to the United States Supreme Court, but instead instituted a new action in the federal district court. Unlike petitioner here, the plaintiff in that case could assert the existence of diversity of citizenship as a basis for federal jurisdiction. However, he also asserted that the state court's refusal to recognize actions for deficiency judgments violated his federal constitutional rights. This Court refused to sanction Mr. Bullington's attempt at piecemeal litigation, holding that his constitutional claims were barred by *res judicata* because he had failed to assert and press them in his earlier state court action.

Contrary to petitioner's suggestions, this principle is not novel, but has been applied in many cases. Its abandonment would encourage the multiplication of piecemeal litigation, and would permit a plaintiff to institute a new lawsuit on the same cause of action every time he could devise a new legal theory. *Tomiyasu* v. *Golden,* 358 F. 2d 651 (9th Cir. 1966); *Rooker* v. *Fidelity Trust Co.,* 263 U.S. 413 (1923); *Norris* v. *Mayor and City Council of Bal-*

timore, 78 F. Supp. 451, 463 (D. Md. 1948); *Chance* v. *County Board of School Trustees,* 332 F. 2d 971 (7th Cir. 1964).

Second, petitioner's complaint of the alleged unconstitutionality of the Illinois special injury rule cannot "bootstrap" him into the United States District Court. Obviously, there is no general federal jurisdiction to challenge any and all unconstitutional rules of state law. The controversy presented by the complaint must itself raise a constitutional issue. As we have already noted, petitioner cannot predicate federal jurisdiction upon the dismissal of his earlier state court litigation, since his remedy for that dismissal lay in appeals to the Illinois Supreme Court and to this Court—a remedy which he deliberately ignored. In the pending litigation, neither of the lower courts has applied or relied upon the special injury rule. Consequently, petitioner's invocation of that rule here amounts at most to a speculation that defendants might rely upon it as a defense at some stage of the proceedings.* However, decisions of this Court have definitively established that an action is not based upon federal law for jurisdictional purposes merely because the plaintiff anticipates that some allegedly unconstitutional defense will be raised to his claim. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950); *Louisville & Nashville R.R.* v. *Mottley,* 211 U.S. 149 (1908); *Tennessee* v. *Union & Planters' Bank,* 152 U.S. 454 (1894); *Metcalf* v. *Watertown,* 128 U.S. 586 (1888); H. Hart and H. Wechsler, *The Federal Courts and the Federal System* 763 (1953); *cf. Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961).

Third, an additional persuasive reason for rejecting petitioner's plea that Illinois taxpayers have no remedy, save

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* Obviously, such speculation is ill founded, since the special injury rule has been abolished by the Illinois Supreme Court and no longer exists even in Illinois.

in the federal courts, is found in the Illinois Supreme Court's recent abolition of the special injury requirement. *Paepcke* v. *Public Building Commission*, 46 Ill. 2d 330, 341, 263 N.E. 2d, 11, 18 (1970). Apparently, therefore, Illinois taxpayers now have standing to maintain in Illinois courts lawsuits on the type of claim which petitioner is attempting to assert. Indeed, one of petitioner's relatives, as a taxpayer, has instituted a new lawsuit in the Illinois courts, challenging a number of other leases of Sanitary District real estate. *Gendel and Booth* v. *North American Car Corp.*, No. 71 CH 2770 (Circuit Court of Cook County, filed June 18, 1971). Under these circumstances, petitioner's attack on the constitutionality of the special injury rule is moot.*

Fourth, petitioner's attack on the constitutionality of the special injury rule is utterly devoid of merit. Petitioner can cite no case which has held that a state is constitutionally required to recognize taxpayer lawsuits to redress "public" injuries, *i.e.*, those in which the alleged injury of the plaintiff is identical to the injury suffered by every other member of the public, or that it is an unconstitutional choice for a state to vest the exclusive right to complain in such cases in appropriate public officials. Indeed, even Judge Will, who declined to dismiss petitioner's

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* Of course, it is respondents' position that petitioner's own claim as a taxpayer is barred by *res judicata* because of the final judgment in his prior state court litigation. While petitioner has dramatically asserted that the question of the right of all other taxpayers to sue is dependent upon the outcome of this litigation, that claim is nonsense. The only *res judicata* question presented in this case is whether *petitioner's* claim is barred by the prior state court judgment against him. The effect, if any, of the prior state court judgment upon actions by taxpayers other than petitioner would be litigated in those actions and would be wholly unaffected by this case.

earlier federal court action against General Dynamics Corporation, rejected petitioner's attack, on equal protection grounds, upon the constitutionality of the Illinois special injury rule. *Booth* v. *General Dynamics Corporation*, 264 F. Supp. 465, 468-469 (N.D. Ill. 1967).

B. The Jurisdictional Amount Requirement Of 28 U.S.C. §1331 Is Applicable To Petitioner's Complaint And Is Not Satisfied.

In addition to asserting a substantial claim arising under the Constitution or laws of the United States, petitioner must either satisfy the $10,000 jurisdictional amount requirement of 28 U.S.C. §1331 or successfully invoke federal jurisdiction under a special provision of the Judicial Code which does not contain a jurisdictional amount requirement. Petitioner argues, in the alternative, that his claim constitutes a civil rights claim under 28 U.S.C. §1343(3) (which requires no jurisdictional amount), or that the alleged claims of all taxpayers relating to the challenged leases can be aggregated to satisfy the jurisdictional amount requirement of Section 1331. Since neither of these alternative theories has merit, petitioner's failure to satisfy the applicable jurisdictional amount requirement constitutes an additional, independent ground for the dismissal of his complaint.

1. Section 1343(3) Cannot Be Invoked Here To Avoid The Jurisdictional Amount Requirement of Section 1331.

The lower courts correctly held that, apart from its failure to raise a substantial constitutional question, petitioner's complaint did not invoke federal jurisdiction under 28 U.S.C. §1343(3) because the complaint alleged deprivation of property rights, rather than the "personal right" type of civil rights claim intended to be covered by Sec-

tion 1343. Petitioner questions the validity of the property right-personal right distinction. However, the rule that property right claims do not fall within Section 1343(3) was originally enunciated by this Court in *Hague* v. *C.I.O.*, 307 U.S. 496, 508 (1939), and has been recently reaffirmed in a *per curiam* decision which petitioner does not even bother to cite. *Hornbeak* v. *Hamm*, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd. per curiam*, 393 U.S. 9 (1968).

Petitioner also seems to argue that his claim is not based upon "property rights" because he asserts a right of procedural due process and equal protection of the laws. This claim cannot withstand analysis. Virtually every complaint challenging state action on federal constitutional grounds is based upon the Fourteenth Amendment, and therefore asserts a denial of due process or equal protection of the laws. The property right-personal right distinction does not depend upon the particular language of the Fourteenth Amendment relied upon, but rather upon the analysis of whether the interests alleged to be infringed are property interests. That petitioner's complaints of inadequate rentals from municipal leases constitute "property" rather than "personal" claims, is too clear to require further discussion. An argument similar to that made by petitioner was rejected in *Hornbeak* v. *Hamm*, 283 F. Supp. 549 (M.D. Ala. 1968), *aff'd. per curiam*, 393 U.S. 9 (1968), in which the plaintiff had alleged a denial of due process and equal protection because of a lack of uniformity of property evaluation and assessment under the Alabama taxing statute. The three-judge district court in that case made the following statement which is equally dispositive of plaintiff's claims here:

> ". . . [E]xistence of an equal protection question does not supply federal jurisdiction under §1343. Not every claim of constitutional violation is a 'civil right'

under the statutes. The complaint in this case avers a denial by the defendants of due process and equal protection under the 14th Amendment. However, since we hold the complaint alleges only a 'property right' not a 'civil right' under §1343 the complaint fails to allege any basis for federal jurisdiction since it does not aver the jurisdictional amount of $10,000 or more under §1331. Therefore, we do not reach the merits of the issue of whether the Alabama procedures attacked by the complaint in fact do or do not violate the 14th Amendment." 283 F. Supp. at 554.

Petitioner's reliance upon *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) and *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969) is misplaced. Each of those cases involved limitations on the right to vote—obviously a "personal right," and one of particular importance in our democratic society.

2. Petitioner May Not Aggregate The Alleged Claims Of All Sanitary District Taxpayers In Order To Satisfy The Jurisdictional Requirement Of Section 1331.

It is undisputed that the $10,000 jurisdictional amount requirement of Section 1331 could be considered satisfied only if petitioner were permitted to aggregate the alleged claims of all taxpayers of the Sanitary District. The law is clear that the aggregation petitioner seeks is improper.

This Court's recent decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969), held that claims in class actions can be aggregated under the new Rule 23 F.R.C.P. only if they have traditionally been subject to aggregation under the case law established by the federal courts. It is clear that municipal taxpayer claims, including those seeking to enjoin an allegedly illegal and unconstitutional public expenditure of funds, are not subject to aggregation. *Scott* v. *Frazier*, 253 U.S. 243, 244 (1920); *Vraney* v. *County of*

Pinellas, 250 F. 2d 617, 618 (5th Cir. 1958); *Fuller* v. *Volk*, 351 F. 2d 323, 327-328 (3rd Cir. 1965) and cases cited therein.

CONCLUSION

For the foregoing reasons, the petition for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

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